UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JESSY BOUSTANY, **Case No.: 15-cv-10023**

Plaintiff,

-against-

XYLEM INC. and GEORGE EL HANI, *Individually*.

Defendant

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PLAINTIFF BOUSTANY'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT XYLEM'S MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

The Plaintiff, Jessy Boustany, (hereinafter "Boustany" or "Plaintiff"), respectfully submits the within memorandum of law in opposition to Defendant Xylem Inc. (hereinafter "Xylem" or "Defendant")'s motion to dismiss the amended complaint. As illustrated by case law and all the pleadings, this Court has jurisdiction over Plaintiff's claims.

ARGUMENT

A. MOTION TO DISMISS STANDARD

Rule 12(b)(6) "provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. The standard of review on a motion to dismiss is heavily weighted in favor of the Plaintiff." Diaz v. NBC Universal, Inc., 536 F.Supp.2d 337, 341 (S.D.N.Y. 2008). "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). "The court is also required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of the plaintiff." Diaz, *supra*, at 341. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007). A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Id*. at 1974. However, "this 'plausibility standard' is a flexible one, 'oblig[ing] a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.' Diaz, *supra*, at 342, *quoting* Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007).

In light of the foregoing pleading standard, Defendant's Rule 12(b)(6) Motion to Dismiss should be denied.

B. Plaintiff's TITLE VII Claims Survive a Motion to Dismiss

Title VII offers protection for individuals employed in the United States. See Title VII, "alien exemption provision," 42 U.S.C 2000e-1. The two business trips Plaintiff took coupled with the complaint, investigation and decision to terminate that took place inside the United States validate that Plaintiff was employed in the U.S. Moreover, Plaintiff was retaliated against and ultimately terminated by individuals in Defendant Xylem's New York office. In light of this, Plaintiff has sufficient contacts in the States to justify Title VII protection and therefore Defendant's motion to dismiss Plaintiff's Title VII claim must be denied.

Defendant's Motion to Dismiss relies on the notion that Plaintiff, an alien, was solely employed by Defendant Xylem in Lebanon and therefore Title VII does not apply. To the contrary, Plaintiff was conducting business in the United States on several occasions and was therefore employed in the United States as required by the statute. To be clear, Plaintiff does not dispute that she is a citizen of Lebanon and that she is not a U.S. citizen. Moreover, Plaintiff does not dispute that she was employed in Lebanon by Defendant Xylem. What Plaintiff does dispute is that she was also employed inside the United States and therefore subjected to the protections of Title VII.

Historically, courts have relied on two different tests to determine whether an individual is employed inside or outside the United States. The primary work station test focuses on where the work is actually performed, and disregards other factors such as the location where the plaintiff was hired, trained, or the location of the employees supervisors. See Shekoyan v. Sibley Int' Corp., 217 F.Supp.2d 59 (2002).

By contrast, the "center of gravity test" looks to the totality of the circumstances but provides a non-exhaustive list of criteria to consider including: (1) the site of the creation of the employment relationship including where the terms of employment were negotiated; (2) the intent of the parties concerning the location of the employment; (3) the locations of the reporting relationships for the position at issue; (4) the actual locations where the employee performed duties and received benefits as well as the relative amount of time the employee spent at each of these sites; and (5) the location of employee's domicile. (See Torrico v. IBM Corp., 213 F.Supp.2d 390 (S.D.N.Y. 2002).

The most significant case on these tests is Torrico v. IBM Corporation. In Torrico, the Plaintiff was a citizen of Chile who asserted that he remained employed in the United States while he was on a three year assignment to Chile. Torrico's former employer, IBM, was a New York Corporation with its principal place of business in Armonk, New York. Plaintiff argued that the alleged acts of discrimination took place in the United States and not Chile and that the temporary assignment did not constitute employment in a foreign country. The court found the primary work-station test insufficient and stated that "whether Torrico was employed abroad or was employed in the United States and merely temporarily deployed to Chili is a question of fact which cannot be answered simply by noting that he spent the bulk of his time in Chile for the three years leading up to the alleged discriminatory termination." Id. In light of this, the Court used the center of gravity test and determined that summary judgment was improper because a reasonable jury could conclude that Plaintiff remained employed in the United States.

An analysis of the gravity test reveals that the actual location where Plaintiff performed duties and received benefits and the locations of the reporting relationships for the positon at issue was significantly held in the United States. Plaintiff travelled to the United States on two separate occasions where she was subjected to Defendant El Hani's unwanted sexual advances. As plead in her complaint, during these trips Plaintiff was conducting business in New York as she was working her normal work day.

On the first business trip on or about January 2013, Plaintiff's supervisor organized a business trip to Chicago and forced Plaintiff to travel with him. El Hani asked Plaintiff to come to his room to discuss work related issues. Plaintiff objected and refused. He told her "I am your boss and I am asking you to come to this hotel." El Hani again began to touch Plaintiff as she kept pushing him away. Defendant El Hani slept with Plaintiff again and then kicked her out of his room. After he kicked Plaintiff out of his room, she collapsed in the hallway. The next day Plaintiff awoke in her own room. Plaintiff attempted to work that day. However, emotionally distraught, Plaintiff fainted again the following day. (See Exhibit A, Plaintiff's Complaint at 30).

On another business trip to Texas, Defendant El Hani booked a room for him and Plaintiff in one hotel and all of the other employees of Defendant were in a different hotel. Plaintiff told Defendant El Hani that she wanted to change her hotel reservation and have another employee change rooms since there were at least four other employees on the trip. Plaintiff did not want to be in the same hotel room as El Hani; however El Hani forced Plaintiff to keep the reservation as is. See Plt. Complaint at 31. Throughout these business trips, Plaintiff was working in her normal capacity, conducting business on behalf of Defendant Xylem.

In regards to Plaintiff's complaints, these complaints were related to sexual assaults by Defendant El-Hani, Defendant Xylem's Managing Director of the Middle East, while the two were working in Texas and Illinois. Moreover the protected activity, the investigation therein occurred inside the state of New York. Moreover, the decision to terminate Plaintiff after her complaint of sexual harassment occurred in New York. On or about September 2013, Plaintiff complained to the regional director of Xylem Valerie Lassalle about the sexual harassment and discrimination she endured at the hands of Defendant El Hani. Valerie Lassalle reported the matter to Cornett Lewers who was the Chief Ethics and Compliance Officer in Xylem's New York headquarters. See Plt. Complaint at 36-37. On or about November 7, 2013, Cornett Lewers reached out to Plaintiff and informed her that an investigation will take place. See Plt. Complaint at 38. Plaintiff than made several written and verbal attempts to reach out to her supervisors and other authorities at Xylem NY about her complaint.

On or about November 11, 2013, November 18, 2013, December 8, 2013, January 12, 2014, January 15, 2014, February 11, 2014, February 12, 2014, February 24, 2014, March 16, 2014, March 20, 2014, March 23, 2014, April 6, 2014, October 14, 2014, October 16, 2014, Plaintiff made complaints to Valerie Lassalle, Cornette Lewers, Zelna Mare, and Vincent Chirouze about Defendant El Hani, the hostile work environment she was being subjected to and acts of retaliation. See Plt. Complaint at 40. On January 06, 2014, February 17, 2014, February 20, 2014, March 18, 2014 Plaintiff reached out by email to Cornett Lewers, Valerie Lassalle and Vincent Chirouze to follow up about the complaint she filed on November 7, 2013. See Plt. Complaint at 42.

Furthermore, plaintiff's complaints of retaliation were also made in the U.S. On or about December 2013/January 2014, in retaliation for complaining about George El Hani, Defendant El Hani demoted Plaintiff. This changed the term and conditions of Plaintiff's employment, included but is not limited to; she was made to report to a manager based in Dubai, making it impossible to get timely responses, guidance and support. All of the other employees in the Lebanon office were promoted to managerial positions. These individuals were unqualified and some of them didn't even have the requisite degree needed for the promotion. Later, some of the employees that had been promoted by Defendant El Hani were demoted because they were unable to fulfill the responsibilities required of them in their new positions. See Plt. Complaint at 44.

On or about December 2013 and later in February 2014, Defendant El Hani further retaliated against Plaintiff by blaming Plaintiff for other employee's work related mistakes. Plaintiff was publically reprimanded and disciplined for these discrepancies. Plaintiff reported Defendant El Hani's retaliation to HR and top management in France and in New York. See Plt. Complaint at 45.

On or about February 2014, Plaintiff's new sales support manager Juby James asked her to come to the Dubai office. This trip was necessary to allow Plaintiff to get the information, support and resources she needed to execute her duties. Defendant El Hani intervened and demanded that she not be allowed to go on this trip. Plaintiff reported this to Cornett Lewers, in New York, and the regional Human Resources representative Valerie Lassalle. While they both seemed very concerned about El Hani's retaliation, they did not do anything to stop his conduct. See Plt. Complaint at 47. This in action, was acquiescence on the part of Defendant Xylem. Around October 2014, Plaintiff's expenses were not getting reimbursed. Plaintiff again reported this to Cornett Lewers in the New York headquarters.

Plaintiff was paid her expenses two months later. Plaintiff sent an email to the CEO Patrick Decker and the HR director Cornett Lewers, advising them of Defendant Xylem's plan to enter into a new business relationship with Defendant EL HANI and her impending termination. They informed Plaintiff that the decision regarding her termination would stand. See Plt. Complaint at 55. This decision was made in New York.

In light of the above it can be logically argued that Plaintiff was employed in the United States and should receive protection under Title VII. Plaintiff made several complaints to the New York office, the investigations into her discrimination and retaliation complaints and the decision to terminate her were all conducted in the New York office. These multiple interactions and communications joined with the fact that Plaintiff was sexually harassed in the States divulge her employment in the States.

C. Plaintiff has sufficiently plead a claim under the New York State Human Rights Law

The New York Executive Law, which is also known as the Human Rights Law, has an explicit provision regarding its extraterritorial application: The provisions of this article shall apply as hereinafter provided to an act committed outside this state against a resident of this state or against a corporation organized under the laws of this state or authorized to do business in this state, if such act would constitute an unlawful discriminatory practice if committed within this state." N.Y.C.L.S Exec § 298-a(1). Courts have interpreted this provision to apply to an act of discrimination committed outside of the state against a state resident, as well as to "a discriminatory act [that] was committed in New York. In order for a nonresident to invoke the protections of the NYSHRL and NYCHRL, she must show that the discriminatory act had an impact within the boundaries of the State and City, respectively. See Hoffman v. Parade Publ'n, 15 N.Y.3d 285 (N.Y. 2010).

While both the New York Court of Appeals and the Court of Appeals for the Second Circuit have held that the impact requirement is not satisfied simply by pointing to frequent communication with a managing office in New York and meetings there regarding local projects. See Fried v. LVI Servc., Inc., 500 F. Appr'x 39, 42 (2d Cir. 2012), the allegations set forth in

Plaintiff's complaint far surpass any decision by this Circuit. As illustrated above, Plaintiff was in constant communication with individuals in the New York headquarters for several months. Both Plaintiff's investigation and the decision to terminate her were made in New York.

Here, the protected activity occurred in New York when Plaintiff complained about the discrimination and retaliation. Moreover, Plaintiff asserts that the discriminatory decisions and investigations were conducted in New York. Therefore, Plaintiff can prove there was a discriminatory impact in the State of New York.

CONCLUSION

For the foregoing reasons, it is respectfully requested that Defendant's Motion to Dismiss the amended complaint be denied in its entirety.

Dated: New York, New York
April 25, 2016

________/s/______________________

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